In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 510

PHILIP STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, after a jury trial, was convicted (R. 326),[1] on the second count of an indictment (R. 3–4) charging a violation of 18 U.S.C. 1001,[2] *viz.*, that he "did then and there knowingly and willfully make and submit false documents to the Tax Court of the

[1] "R." references are to be mimeographed record in the court of appeals.

[2] This section provides as follows:

"Who ever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

234-380—66

United States * * * by introducing into evidence * * * match book covers * * * which had recorded thereon dates in 1952 and amounts of gambling wins and losses, whereas * * * the notations [bearing certain specified dates] * * * were not made on the dates shown" (R. 3). The court of appeals affirmed (Pet. 17).

This indictment grew out of prior Tax Court proceedings. The Commissioner had disallowed certain gambling losses allegedly suffered by petitioner in 1952–1954. In an effort to substantiate these losses, petitioner testified in the Tax Court that it was his practice at the end of each gambling day to note his winnings or losses on a match book cover, cocktail napkin, etc., and later transcribe the information to his notebook (introduced into evidence as Exhibit 10), which he used to prepare his tax return. Petitioner produced a shoebox containing match book covers, etc. (admitted as Exhibit 12), with notations on each of amounts won and lost on specified dates in 1952. (Pet. 10.) The relevant portion of petitioner's Tax Court testimony with regard to the match book covers, etc., is set forth in the appendix, *infra*, pp. 6–8.

The instant indictment charged petitioner with perjury (count one), based upon his above-described oral testimony in the Tax Court, and with submitting false documents (count two), based upon the above described match book covers, etc., introduced into evidence in the Tax Court (R. 1–4, 36, 41). At trial petitioner admitted that the notations on the match book

covers, etc., had not been in existence in 1952 (R. 144–146). The jury convicted petitioner on the false documents count and acquitted on the perjury count.

Petitioner now contends that count two of the indictment failed to inform him of the nature of the accusation and permitted conviction even if the jury believed his defense that he never represented to the Tax Court that the match book notations were contemporaneous records. Neither contention has merit.

Count two clearly informed petitioner of the charge he must be prepared to meet. As the court of appeals observed (Pet. 11–12):

> The essential element of falseness is charged by the allegation that the notations on the match book covers "were not made on the dates shown." This was enough to apprise appellant that he was charged with holding out these notations as having been made on the dates shown on the items when in fact they were not made then.

Furthermore, it is obvious that petitioner's contention is a mere afterthought, since he never requested a bill of particulars as he would have been entitled to do if he had actually been in doubt as to the nature of the charge against him. Fed. Rules of Crim. Proc. 7(f). Moreover, it is clear from the record that petitioner was not taken by surprise. Petitioner's testimony in the prior Tax Court case with regard to the match book covers (see Appendix, *infra*, pp. 6–8) was read to the jury in this case and petitioner's counsel questioned him extensively on what he had meant by that testimony. In response to these ques-

tions petitioner testified that he had never intended to represent to the Tax Court that the entries on the match book covers, etc., were original entries or contemporaneous records. (R. 135–206.) Petitioner's real complaint is that the jury did not believe his defense.

Nor is there merit to petitioner's contention that the indictment failed to allege that he had misrepresented the nature of the entries on the match book covers and thus that the jury was not permitted to acquit him even if it believed his defense. For if petitioner had never represented to the Tax Court that the documents here in question were original or contemporaneous records, but had offered them merely as recently prepared examples of the way in which he kept records of his gambling wins and losses, then they would not have been "false documents" as alleged in count two. Moreover, if there had at the time of the trial been any doubt as to whether petitioner's defense, if believed by the jury, would have required acquittal, he could have requested such an instruction to the jury. But the record indicates that he made no objection to the court's charge (R. 308–326). The entire conduct of the trial—including petitioner's extensive testimony in the district court as to what he had meant by his Tax Court testimony (R. 135–206)—demonstrates that all parties understood that this issue was relevant in determining whether the documents were "false."

Since petitioner's contentions are without merit and there is no conflict of decisions, the petition should be denied.

Respectfully submitted.

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OCTOBER 1966.

APPENDIX

In relevant part, petitioner's testimony to the Tax Court regarding this shoebox of match book covers, etc., was as follows (R. 34–43):

Q. [Direct examination by defendant's counsel, Mr. Klepak] * * * you had been requested by the Internal Revenue Department to find whatever you could in reference to these so-called match folders and cocktail napkins and other things, score cards, and things as to your records, were you able to find them?

A. They never did ask me, but when I was going through the garage, cleaning it up the other day, I found those.

Q. Now, actually what I have in my hand, what do they represent?

A. My losings and winnings for the year 1952.

* * * * *

Q. How is it you found this stack?

A. They were just put away in there. The others were thrown away. I didn't ever put—I would have throwed those away if I had known what they were.

Q. I see. Was it from these you then made your entry into the books?

A. I did.

* * * * *

Q. I will ask you, if you will, will you identify the various items in this box and tell the Court what they are and how you kept records and whether—how you then transposed them into the books that you have?

A. Well, they are from different tourist courts——

The COURT: Well, just a minute. If you intend to offer this in evidence, you are going to have to mark these for identification.

* * * * *

Mr. KLEPAK: If it please the Court, I am just wondering—I imagine there would be over a hundred and some odd—they are all matchbox folders, score cards, cocktail napkins from all over the United States.

The COURT: Mark the box and its contents as one exhibit.

The CLERK: Exhibit 12 for identification.

* * * * *

The COURT: How did you use those records in the shoebox to keep your other records?

The WITNESS: Well, at the end of the year, when I got ready to make my return out, I copied those out of there, I sorted those out day for day and wrote them in the little notebook.

* * * * *

Q. Have you since you found these, have you checked these against what was entered in those books, in Exhibit No. 10?

A. Yes, sir.

Q. Did you find every one of the match folders with the dates on them showing the amount won or lost that corresponded with Exhibit No. 10?

A. I did.

Q. Now, if it please the Court, we will just spot check some of them. Will you take some of them out and explain what cities, how you wrote it on the match folder?

A. This is in Fort Worth November 11, 1952, won $486.

Q. In other words, you wrote the date, you put "W" and you wrote the amount?

A. Yes, sir.

* * * * *

Q. Getting to these little slips, how many cities in the United States, how many do these represent?

A. Several.

Q. Several, you say several; how many do these represent?

A. Twenty, thirty.

The COURT: Well, the exhibit will show for itself.

* * * * *

Q. I will ask you, then, at the time that you made the entries into these books, first in the little instruments that you referred to, match folders, were those correct at that time when you made those entries?

A. That's right.

* * * * *

Q. And then when you put them into the books, were those correctly taken from the other instruments?

A. That's right.

Q. And did you base it then on your actual record, or did you base it on memory?

A. On the records.

By Mr. MILLS:

Q. You testified that these slips—It is now your testimony these slips were true and correct? correct?

A. Yes, sir.

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